IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA.

Regular Second Appeal No. 110 of 1997.

Date of Decision: 26th February,2008.

Smt. Sharda Devi ***…..Appellant***

Versus

State of H.P. and others. ***…..Respondents.***

Coram

The Hon'ble Mr. Justice Dev Darshan Sud,Judge.

Whether approved for reporting?[1]

For the Petitioner: Mr. G.D. Verma, Sr. Advocate, with Mr. Romesh Verma, Advocate

For the Respondents: Ms. Ruma Kaushik, Addl. Advocate General, for respondent Nos. 1 and 2.

Dev Darshan Sud, Judge.

This appeal has been preferred by the plaintiff against the judgment of the learned courts below dismissing the suit filed by her claiming damages from the respondent-State and others to the extent of Rs. 1, 50,000/- for a failed tubectomy operation performed upon her at Kamla Nehru Hospital, Shimla, H.P.

The undisputed facts are that surgery was performed on the plaintiff by respondent No. 3 when the plaintiff was admitted

[1] Whether Reporters of Local Papers may be allowed to see the judgment?

in hospital in an advance stage of pregnancy. The plaintiff alleges that defendant No. 3 had held out a categorical assurance that after the sterilization operation, the plaintiff would not bear any more children.

In December, 1985, plaintiff became pregnant and on 12.12.1985 when she got herself medically examined at the Ripon Hospital, Shimla, since examination was carelessly conducted at the Kamla Nehru Hospital, it was confirmed at Ripon Hospital that she was pregnant. The plaintiff was surprised and shocked to know that she had conceived despite having undergone tubectomy. She and her husband did not want any other child and therefore, resorted to terminate the unwanted pregnancy on 14.12.1985 at Ripon Hospital itself. The allegations in the plaint are that the sterilization operation had not been performed in a professional manner and the plaintiff suffered a trauma and was in a state of mental shock.

The learned trial court framed eight issues and on the important issue as to whether defendant No. 3 was negligent, the learned trial court after a thorough appreciation of the evidence, both oral and documentary held that there was no negligence on the part of the defendants. The plaintiff appealed to the learned District Judge who, while upholding the judgment of the learned trial court further held that the suit was barred by limitation.

This appeal was admitted on 13.6.1997 by this court

on two questions of law viz:-

1. Whether the District Judge, Shimla is right in setting aside the findings of the trial court on issue No. 4 to hold that the suit of the appellant-plaintiff was time barred?
2. Whether the District Judge, Shimla has misread and mis-appreciated the pleadings and oral and documentary evidence on record?

On the first question the learned District Judge has misdirected himself on facts and has been very casual in making the observation and holding that the suit was barred by time. According to him the tubectomy operation was performed on March 11, 1981 and she developed pregnancy in December, 1985 and therefore, the suit is barred by limitation. To say the least, the approach of the learned District Judge is absolutely perfunctory and shows a clear non-application of mind. The suit could have been filed by the plaintiff only when she had suffered the unwanted pregnancy and not before that. Before that there was no cause of action which had arisen to her. On the admitted facts she became pregnant in December, 1985. The suit was filed on 15.12.1986 which is admittedly within one year of the tortuous act alleged to have been committed by the defendants. This finding of the District Judge, therefore requires to be quashed and set aside. This question is answered in favour of the appellant.

The second question need not detain this court any further. In **State of Punjab vs. Shiv Ram and others (2005) 7**

SCC 1 the Hon'ble Supreme Court was dealing with a matter on some what similar facts. Their Lordship after considering the entire case law reiterating the earlier decision of the court in **Jacob Mathew vs. State of Punjab (2005) 6 SCC 1,** held that merely because the wife of the respondent before the apex Court had conceived despite tubectomy operation having been performed was not entitled to damages. Their Lordships were pleased to hold:-

> "25. We are, therefore, clearly of the opinion that merely because a woman having undergone a sterilization operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort can be sustained only if there was negligence on the part of the surgeon in performing the surgery. The proof of negligence shall have to satisfy *Bolam's test.* So also, the surgeon cannot be held liable to contract unless the plaintiff alleges and proves that the surgeon had assured 100% exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. As noted in various decisions which we have referred to hereinabove, ordinarily a surgeon does not offer such guarantee.
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> 26. The cause of failure of the sterilization operation may be obtained from laparoscopic inspection of the uterine tubes, or by x-ray examination, or by pathological examination of the materials removed at a subsequent operation of resterilization. The discrepancy between operation notes and the result of

x-ray films in respect of the number of rings or clips or nylon sutures used for occlusion of the tubes, will lead to logical inference of negligence on the part of the gynaecologist in case of failure of sterilization operation (*See law of Medical Negligence and Compensation by R.K. Bag, 2nd Edn., p139)*

27. Mrs. K. Sarada Devi, the learned counsel appearing for the plaintiff-respondents placed reliance on a two-judge Bench decision of this court in *State of Haryana v. Santra (2000) 5 SCC 182* wherein this court has upheld the decree awarding damages for medical negligence on account of the lady having given birth to an unwanted child on account of failure of sterilization operation. The case is clearly distinguishable and cannot be said to be laying down any law of universal application. The finding of fact arrived at therein was that the lady had offered herself for complete sterilization and not for partial operation and, therefore, both her fallopian tubes should have been operated upon. It was found as a matter of fact that only the right fallopian tube was operated upon and the left fallopian tube was left untouched. She was issued a certificate that her operation was successful and she was assured that she would not conceive a child in future. It was in these circumstances, that a case of medical negligence was found and a decree for compensation in tort was held justified. The case thus proceeds on its own facts.

28. The methods of sterilization so far known to medical science which are most popular and prevalent are not 100% safe and secure. In spite of the operation having been successfully performed and without any negligence on the part of the surgeon, the

sterilized woman can become pregnant due to natural causes. Once the woman misses the menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice….."

On the facts, their Lordship held:-

"8. The plaintiffs have not alleged that the lady surgeon who performed the sterilization operation was not competent to perform the surgery and yet ventured into doing it. It is neither the case of the plaintiffs, nor has any finding been arrived at by any of the courts below that the lady surgeon was negligent in performing the surgery. The present one is not a case where the surgeon who performed the surgery has committed breach of any duty cast on her as a surgeon. The surgery was performed by a technique known and recognized by medical science. It is a pure and simple case of sterilization operation having failed though duly performed. The learned Additional Advocate General has also very fairly not disputed the vicarious liability of the State, if only its employee doctor is found to have performed the surgery negligently and if the unwanted pregnancy thereafter is attributable to such negligent act or omission on the part of the employee doctor of the State.

31. For the foregoing reasons, we are of the opinion that the judgments and the decrees passed by the High Court and the courts below cannot be sustained. The trial court has proceeded to pass a decree of damages in favour of the plaintiff-respondents solely on the ground that in spite of the plaintiff respondent 2 having undergone a sterilization operation, she

> became pregnant. No finding has been arrived at that will hold the operating surgeon or its employer- the State, liable for damages either in contract or in tort. The error committed by the trial court, though pointed out to the first appellate court and the High Court, has been overlooked. The appeal has, therefore, to be allowed and the judgment and decree under appeal have to be set aside."

Looking to the pleadings of the parties and evidence on record, I do not find that there is any evidence on the record to show and suggest that respondent No. 3 has been negligent or that she performed tubectomy operation by a procedure which is unknown to medical science. The allegations of negligence are general in nature and not substantiated by any expert evidence. It is also established on the record that the plaintiff had voluntarily agreed to undergo tubectomy and was not forced or enticed to undergo the procedure. In these circumstances, it is not possible to accept the contention of the learned counsel appearing for the appellant that the learned District Judge has misread and misappreciated the oral and documentary evidence on record. He has reaffirmed the findings of the learned trial court on the issue of negligence. Both the courts having concurrently held that there is no negligence. I have gone through the record of the case only to ascertain as to whether any document or oral evidence has been misread by any of the courts below but I could not persuade myself

to hold that such an approach was indeed adopted by the courts below. This appeal therefore, is dismissed with no order as to costs.

26th February, 2008. **(Dev Darshan Sud),**
(cm) **Judge.**